

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

BRET C. KIFER and JENNIFER A.  
KIFER,

Plaintiffs,

v.

AMERICAN FAMILY MUTUAL  
INSURANCE COMPANY,

Defendant.

CASE NO. 13-6085 RJB

ORDER ON DEFENDANT'S  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT

This matter comes before the Court on Defendant American Family Mutual Insurance Company's ("American Family") Motion for Partial Summary Judgment Re: *Olympic Steamship Fees*. Dkt. 37. The Court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

This case arises from an insurance coverage dispute following a November 3, 2012 fire at Plaintiffs' personal residence. Dkt. 1. At the time of the fire, Plaintiffs had an insurance policy with Defendant, policy number 46-BD7584-01. Dkt. 18-1. Plaintiffs make claims for breach of contract and for violations of the duties of good faith and fair dealing found in the Washington Administrative Code 284-30-330. Dkt. 1. American Family now moves the Court for a ruling

1 that Plaintiffs are not entitled to any attorneys' fees under *Olympic Steamship Co. v. Centennial*  
 2 *Ins. Co.*, 117 Wash.2d 37 (1991) because there has been no denial of coverage. For the reasons  
 3 set forth below, the motion should be granted.

#### 4 **RELEVANT FACTS**

5 The facts and procedural history are contained in this Court's Order on Defendant's  
 6 Motion to Compel Appraisal (Dkt. 25, at 1-3) and the Order on Defendant's Motion to Confirm  
 7 Appraisal Award Re: Contents Claim (Dkt. 35, at 1-2), and are adopted here.

8 Pursuant to the appraisal awards, American Family has now paid \$419,515.19 for the  
 9 structure and \$328,095.27 for the contents. Dkt. 38. As of November 6, 2014, it has paid  
 10 \$90,000 in "ALE" benefits (for the fair rental value of the premises if uninhabitable) under the  
 11 policy. *Id.* It has further agreed to pay ALE benefits in full, with a termination of benefits as of  
 12 January 11, 2015. *Id.*

13 The discovery deadline is December 21, 2014, the dispositive motions deadline is  
 14 January 20, 2014, and trial is set to begin on April 20, 2015. Dkt. 29.

#### 15 **SUMMARY JUDGMENT STANDARD**

16 Summary judgment is proper only if the pleadings, the discovery and disclosure materials  
 17 on file, and any affidavits show that there is no genuine issue as to any material fact and that the  
 18 movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is  
 19 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient  
 20 showing on an essential element of a claim in the case on which the nonmoving party has the  
 21 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue  
 22 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find  
 23 for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586  
 24

(1986)(nonmoving party must present specific, significant probative evidence, not simply “some metaphysical doubt.”). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9<sup>th</sup> Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non specific statements in affidavits are not sufficient, and “missing facts” will not be “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

### **DISCUSSION**

In Washington, an insured may recover attorney's fees “in any action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract. . . .” *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wash.2d 37 (1991). *Olympic Steamship*, however, applies only when the insurer wrongfully denies coverage. *Greengo v. Public Employees Mut. Ins. Co.*, 135 Wash.2d 799 (1988)(*internal citations omitted*). It does not apply if value of the claim is in dispute. *Id.*; *Woo v. Fireman's Fund Ins. Co.*, 150

1 Wash. App. 158, 175-76 (2009)(denying motion for award of attorneys' fees noting that  
 2 "*Olympic Steamship* authorizes an award of attorney fees only if the insured is required to  
 3 litigate an issue of coverage, as opposed to the value of the claim.")

4 To the extent that Plaintiffs seek attorneys' fees under *Olympic Steamship*, that claim  
 5 should be dismissed. The dispute in this case was not over coverage. American Family accepted  
 6 coverage. American Family's Motion for Partial Summary Judgment Re: *Olympic Steamship*  
 7 Fees (Dkt. 37) should be granted.

8 Further, Plaintiffs failed to respond to the motion. Pursuant to Local Rule W. D. Wash.  
 9 7(b)(2), "if a party fails to file papers in opposition to a motion, such failure may be considered  
 10 by the court as an admission that the motion has merit." The Court should so construe Plaintiffs'  
 11 failure to respond.

## 12 ORDER

13 Therefore, it is hereby **ORDERED** that:

- 14 • Defendant American Family Mutual Insurance Company's Motion for Partial  
 15 Summary Judgment Re: *Olympic Steamship* Fees (Dkt. 37) is **GRANTED**; and
- 16 • To the extent that Plaintiffs seek attorneys' fees under *Olympic Steamship*, that  
 17 claim is **DISMISSED**.

18 The Clerk is directed to send uncertified copies of this Order to all counsel of record and  
 19 to any party appearing pro se at said party's last known address.

20 Dated this 1<sup>st</sup> day of December, 2014.

21 

22 ROBERT J. BRYAN  
 23 United States District Judge  
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